# STATE OF MICHIGAN

# COURT OF APPEALS

JAMES D. WAGNER,

Plaintiff-Appellee,

V

CHERYL M. WAGNER,

Defendant-Appellant.

UNPUBLISHED
August 17, 2006

No. 268250
Macomb Circuit Court
LC No. 04-003706-DM

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from a judgment of divorce that awarded the parties joint legal custody of their two daughters, Haleigh and Jessica, but awarded physical custody of the children to plaintiff. We reverse and remand for further proceedings regarding custody.

"To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 882 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994). The trial court's findings of fact "should be affirmed unless the evidence 'clearly preponderates in the opposite direction.'" *Id.* at 879 (Brickley, J.), 900 (Griffin, J.), quoting *Murchie v Standard Oil Co*, 355 Mich 550, 558; 94 NW2d 799 (1959). "When reviewing findings of fact, this Court defers to the trial court on issues of credibility." *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). The court's discretionary dispositional rulings—such as "[t]o whom custody is granted"—are reviewed for a palpable abuse of discretion. *Fletcher*, *supra* at 880-881 (Brickley, J.), 900 (Griffin, J.). Questions of law are reviewed for "clear legal error." *Fletcher*, *supra* at 881 (Brickley, J.), 900 (Griffin, J.). "When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct." *Id.*

I

Defendant first argues that the trial court erred in finding that there was no established custodial environment with either parent. We agree.

MCL 722.27(1)(c) states, in pertinent part:

> The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

An established custodial environment depends

> upon a custodial relationship of significant duration in which [the child] was provided the parental care, discipline, love, guidance and attention appropriate to his age and individual needs; an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence. [*Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981).]

Whether an established custodial environment exists is a question of fact for the trial court to resolve based on the statutory best interests factors. *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001).

In considering whether an established custodial environment existed, the trial court focused on the physical environment surrounding the children and failed to consider the remaining statutory factors bearing on this issue. See *Baker*, *supra*. The evidence shows that defendant had physical custody of the children their entire lives, and was the parent consistently available to them on a daily basis, to provide guidance, discipline, the necessities of life, and parental care, love, and comfort. The trial court's determination that an established custodial environment did not exist with defendant was against the great weight of the evidence.

Because the trial court determined that an established custodial environment did not exist with defendant, it applied a preponderance of the evidence standard in determining whether a change of custody was in the children's best interests. This constitutes error. While the record supported many of the trial court's findings and conclusions relative to awarding physical custody to plaintiff, we are unable to determine whether the court's findings and conclusions were affected by its application of the improper evidentiary standard.

"When a custody decision would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that the change is in the child's best interests." *Mason v Simmons*, 267 Mich App 188, 195; 704 NW2d 104 (2005), citing MCL 722.27(1)(c) and *LaFleche v Ybarra*, 242 Mich App 692, 697; 619 NW2d 738 (2000). "If a trial court improperly adjudicates a child-custody dispute, and the impropriety is not harmless, the appropriate remedy is to remand for reevaluation." *Harvey v Harvey*, 257 Mich App 278, 292; 668 NW2d 187 (2003), aff'd on other ground, 470 Mich 186; 680 NW2d 835 (2004), citing *Fletcher*, 447 Mich at 882, 889 (Brickley, J.), 900 (Griffin, J.), and *Foskett*, 247 Mich App at 12.

II

Defendant also argues that the trial judge was biased against her and, because the court retained continuing jurisdiction over custody and child support matters, asks this Court to direct that the case be reassigned to a different judge. We find no basis for granting this relief.

In determining whether a case should be assigned to a different judge, the following factors should be considered:

> "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." [*People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986), quoting *United States v Sears, Roebuck & Co*, 785 F2d 777, 780 (CA 9, 1986).]

We find no basis in the record for concluding that the trial judge was biased for plaintiff or against defendant, or would have substantial difficulty setting aside views or findings found to be erroneous. Contrary to defendant's argument, the trial court considered the shortcomings of both parties and was guided by the children's best interests. Reassignment is not warranted.

III

In light of our disposition remanding this case to the trial court, we do not address several of defendant's remaining challenges. However, because the issue may arise again on remand, we address defendant's contention that the trial court erred in admitting two Friend of the Court ("FOC") reports into evidence, over her objection.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Preliminary issues of admissibility are reviewed de novo, but it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id*. "An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A); see also MRE 103(a).

As amended in March 2003, MRE 1101(b)(9) provides that the rules of evidence do not apply to "[t]he court's *consideration* of a report and recommendation submitted by the friend of the court pursuant to MCL 552.505(1)(d) or (e)." At the time MRE 1101 was amended, MCL 552.505(1)(d) and (e) dealt with custody and parenting time, and child support, respectively. In June 2003, subsections (1)(d) and (e) were renumbered as (1)(g) and (h), but MRE 1101(b)(9) has not been amended accordingly. In any event, MRE 1101(b)(9) does not state that an FOC report concerning custody may be admitted into evidence. Rather, it states that the trial court may "consider" the report. This is in accord with prior case law holding that FOC reports and recommendations concerning custody may be placed in the court file and considered by the trial court, but may not be admitted into evidence absent the agreement of the parties. See *Duperon v*

*Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989); *Nichols v Nichols*, 106 Mich App 584, 588 (majority opinion), 589-592 (Beasley, J., concurring); 308 NW2d 291 (1981). "The trial court's ultimate findings relative to custody must be based upon competent evidence adduced at the hearing." *Duperon, supra* at 79. "[T]he FOC's report may not form the basis for the trial court's findings." *Id.*

We conclude that MRE 1101(b)(9) did not change the law in terms of allowing a trial court to consider an FOC custody report, nor does it provide that the report may be admitted into evidence over a party's objection. Indeed, the staff comments to MRE 1101(b)(9) indicate that the purpose of the amendment was to "correct[] a common misreading" of MRE 703 and allow a trial court to *consider* custody and child support FOC reports even if they contain "reports and evaluations by outside persons or agencies if requested by the parties or the court." The trial court thus abused its discretion in admitting the FOC reports into evidence over defendant's objection.

Reversed and remanded for further proceedings regarding custody. "[O]n remand the court should consider up-to-date information, including the children's current and reasonable preferences, as well as the fact that the children have been living with the plaintiff . . . and any other changes in circumstances arising since the trial court's original custody order." *Fletcher, supra* at 889. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Helene N. White